

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO G. GARCIA,

Defendant and Appellant.

F043367

(Super. Ct. No. 03-109476)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Marilyn Drath, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Harris, Acting P.J., Gomes, J. and Dawson, J.

STATEMENT OF THE CASE

On May 12, 2003, a complaint was filed in Tulare Superior Court charging Gerardo Gaxiola Garcia with the following: attempted willful, deliberate and premeditated murder in violation of Penal Code sections 664/187¹ (count 1); assault with a deadly weapon in violation of section 245, subdivision (a)(1) (count 2); and criminal threats in violation of section 422 (count 3). It was further alleged in counts 1 and 2 that Garcia personally inflicted great bodily injury upon another within the meaning of section 12022.7, subdivision (a). Additionally, it was alleged in count 1 that Garcia used a deadly or dangerous weapon in the commission of the offense within the meaning of section 12022, subdivision (b)(1).

On May 13, 2003, Garcia was arraigned and entered a plea of not guilty.

On May 29, 2003, Garcia withdrew his not guilty plea and pled no contest to assault with a deadly weapon.

On June 26, 2003, the trial court sentenced Garcia to the aggravated term of four years in state prison.

On June 30, 2003, Garcia filed a timely notice of appeal.

On November 3, 2003, the Tulare Superior Court granted Garcia's request for certificate of probable cause.

STATEMENT OF FACTS

On May 6, 2003, Daniel Laredo and his friend Mike Herrera were at Garcia's house. Laredo and Herrera got bored and decided to leave. As Laredo went out to the front yard of Garcia's residence, Garcia suddenly "sucker punched" him in the face. In response, Laredo hit Garcia a few times. Subsequently, Garcia went inside his house and Laredo and Herrera walked away from the area.

¹All further statutory references are to the Penal Code.

A short time later, Garcia again attacked Laredo, this time striking him several times in the back with a baseball bat. Garcia also attempted to hit Laredo in the head with the baseball bat, but Laredo blocked the blows with his arm. As Laredo and Garcia continued to struggle, Garcia's girlfriend, Sara Cruz, appeared and stabbed Laredo on his forearm with a knife. At this point Garcia and Cruz went back inside Garcia's residence and Laredo and Herrera walked to Herrera's residence.

The police contacted Laredo that evening. Laredo's left forearm had a deep laceration and was bleeding profusely. Laredo's right forearm was also lacerated and he had some redness on the left side of his neck and some swelling and bruising to his left side above the kidney area. The police smelled an odor of alcoholic beverage coming from Laredo.

Laredo initially stated that several people had jumped him while he was returning home; a female had attacked him with a knife and a male with a baseball bat. Laredo stated he did not know the identities of his attackers. Later, Laredo admitted he knew who had assaulted him , but said he did not wish to press charges.

The next day, Laredo told police that Garcia and Cruz were his assailants. Laredo explained he was afraid to report the incident because he feared Garcia would retaliate.

Garcia contends he was deprived of his right to make an effective motion to withdraw his no contest plea. We disagree and will affirm.

DISCUSSION

On May 29, 2003, the district attorney represented that Garcia would be pleading to a violation of section 245, subdivision (a)(1) (assault with a deadly weapon, a bat).

Garcia was advised that the most time he could receive in state prison was four years. When asked if he had had enough time to speak with his lawyer and if he was satisfied with the advice he received, Garcia said "yes."

The court explained to Garcia that the district attorney was reducing the attempted murder charge to assault with a deadly weapon, and Garcia answered "yes" to the

question of whether he was responsible for this offense. Garcia was advised of and waived his constitutional rights. He pled no contest to the assault with a deadly weapon charge.

On June 26, 2003, Garcia appeared for a sentencing hearing. The public defender informed the court Garcia wanted to withdraw his plea because he thought he had a good case and wanted to fight it. The public defender said she had spoken with Garcia and she did not see a legal basis for withdrawing his plea.

Thereafter, the judge asked Garcia if he wanted to state his reasons for requesting to withdraw his plea. Garcia explained he didn't understand what his attorney was saying during the last court appearance and he didn't have enough time to talk about the case. Garcia said that he thought if he pled no contest it would continue his case. He didn't understand he would be sentenced and he wanted to continue fighting his case.

The public defender again said she saw no legal basis to withdraw the plea and there was no legal cause why sentencing should not go forward.

Section 1018 permits a plea of guilty to be withdrawn prior to judgment for good cause shown. It is the defendant's burden to establish good cause by clear and convincing evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea." (*People v. Cruz* (1974) 12 Cal.3d 562, 566). However, the defendant's change of mind, alone, does not constitute good cause for withdrawal of a guilty plea. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) A guilty plea should not be set aside lightly, and finality of proceedings should be encouraged. (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.)

The withdrawal of a guilty plea is left to the sound discretion of the trial court. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) Garcia contends that the public defender in his case had a duty to make a motion on his behalf to withdraw his plea,

relying on *People v. Brown* (1986) 179 Cal.App.3d 207 and *People v. Osorio* (1987) 194 Cal.App.3d 183. Both cases are distinguishable from the instant case.

In *Osorio*, the defendant expressed a desire to withdraw his guilty plea. Defense counsel stated he could not “in good conscience” file a motion to withdraw the defendant’s plea even though, according to counsel, there appeared to be favorable grounds for such a motion. (*People v. Osorio, supra*, 194 Cal.App.3d at pp. 186, 188.) The court held that because there was a “colorable basis” for the motion to withdraw the guilty plea, the judgment must be set aside for the limited purpose of permitting the defendant to make such a motion with counsel’s assistance. (*Id.* at p. 189.)

In *Brown*, the defendant pled no contest to several counts of committing lewd acts upon a child with the use of force. (*People v. Brown, supra*, 179 Cal.App.3d at pp. 210-211.) At the sentencing hearing, the defendant’s attorney informed the court defendant wanted to withdraw his plea; however, defense counsel represented there was no legal basis for such a motion. (*Id.* at p. 211.) The defendant addressed the court and stated he was not in the “right frame of mind” at the time of his plea because he had been shaken up by a death. The trial court even acknowledged that the defendant was emotional at the time of his plea. The appellate court held defense counsel had a duty to file the plea withdrawal motion because it would not have been frivolous, nor would it have compromised accepted ethical standards.

In the instant case, unlike in *Brown* and *Osorio*, a motion to withdraw Garcia’s plea of no contest would have been frivolous and without any colorable basis. At the sentencing hearing, Garcia stated he wanted to withdraw his plea for the following three reasons: (1) He had not understood what his attorney was saying; (2) he had not had enough time to talk to his attorney; and (3) he thought pleading no contest would continue the case. These justifications are clearly refuted by the record. Garcia gave direct answers to questions from the court clearly assuring the court he had had sufficient time to discuss the case with his lawyer and he was satisfied with his lawyer’s advice.

There is nothing in the record that shows Garcia was confused, uninformed, rushed or pressured into pleading no contest to the charge. The court informed Garcia of the consequences of his plea, which Garcia said he understood. Additionally, Garcia acknowledged by pleading “guilty or no contest” he was, in fact, responsible for committing the underlying offenses and giving up his rights to a jury trial, to subpoena witnesses and to present evidence. Accordingly, his claims are implausible.

It appears Garcia merely changed his mind about pleading no contest and desired to fight his case. This is not good cause for withdrawal of his no contest plea. (*People v. Huricks, supra*, 32 Cal.App.4th at p. 1208.) Buyer’s remorse is insufficient to compel a court to permit withdrawal of a plea. (*People v. Knight* (1987) 194 Cal.App.3d 337, 344.)

Garcia has not shown any legitimate colorable basis to support the withdrawal of his plea. Thus, his trial counsel had no duty to file any such motion because it would have been frivolous. The judgment is affirmed.